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Office of Administrative Law Judges
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Issue Date: 02 February 2005

CASE NO.: 2004-LHC-863

OWCP NO.: 07-163050

IN THE MATTER OF:

NEAL F. WASHINGTON,

Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS, INC.,

Employer

APPEARANCES:

Sue Esther Dulin, Esq.,

On behalf of Claimant

Paul B. Howell, Esq.,

On behalf of Employer

BEFORE: Lee J. Romero, Jr.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et. seq., brought by Neal F. Washington (Claimaint) against Northrop Grumman Ship Systems, Inc. (Employer). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on August 11, 2004, in Gulfport, Mississippi.

At the hearing all parties were afforded the opportunity to adduce testimony and offer documentary evidence. Claimant

testified, called Melinda Wiley as an adverse witness, and introduced twenty-one (21) exhibits which were admitted, including: various Department of Labor filings; Claimant's personnel file at Employer; Claimant's daily wage records; Employer's hospital records; medical records and deposition of Dr. Barnes; medical records from Singing River Hospital; records from Gulf Coast Physical Therapy and therapist John Egbert; vocational rehabilitation records of Robert Walker; and excerpts from the collective bargaining agreement (CBA) between Employer and the Union.[1] Employer also introduced twenty-one (21) exhibits, which were admitted, including: various filings with the Department of Labor; Claimant's choice of physician form; medical records from Employer's infirmary and the emergency room; medical records and deposition of Dr. Barnes; vocational records from Tommy Sanders; and an offer of post-injury employment. The parties entered into written factual stipulations which were received as Joint Exhibit No. 1 (JX-1).

The parties provided closing arguments at the end of the hearing in lieu of filing post-hearing briefs. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated (JX-1) and I find:

1. Claimant sustained an injury on March 7, 2002;

2. Claimant's injury was in the course and scope of his employment;

3. An employer-employee relationship existed at the time of Claimant's injury;

4. Employer was advised of the injuries on March 7, 2002;

5. Employer filed a Notice of Controversion on October 4, 2002;

[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's Exhibits- CX-__, p.__; Employer Exhibits- EX-__, p__; Joint Exhibits- JX-__, p.__.

6. An informal conference with the District Director was held on October 30, 2003;

7. Claimant's average weekly wage at the time of his injury was $757.25;

8. Employer paid temporary total benefits at the compensation rate of $483.50 per week from March 8, 2002, through present and continuing;

9. Employer has paid medical benefits;

10. Claimant has not yet reached Maximum Medical Improvement.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Extent of Claimant's disability;

2. Existence of suitable alternative employment;

3. Attorney's fees and interest.

III. STATEMENT OF THE CASE

Testimonial Evidence

Claimant

Claimant is a 48-year old divorced male residing in Moss Point, Mississippi with two dependent children; he has a third child to whom he pays child support.[2] (Tr. 22-23). Claimant testified he quit the eleventh grade and volunteered for the military in 1974, where he earned his GED. He can do simple math and read and write, but has problems understanding "big words." Claimant testified he guessed on the GED as he did not understand many of the questions or answers on the multiple

[2] On cross-examination, Claimant testified he is up to date with his child support payments, which he pays himself. They do not come out of his paycheck. (Tr. 57).

choice test. (Tr. 23-25). Claimant was a radio teletype operator in the military. After his honorable discharge he worked for a construction company and then received a welder's certificate at vocational school in Natchez, Mississippi. (Tr. 24-26).

Claimant was initially hired as an apprentice welder at Employer on June 21, 1976, but took a welding job in Natchez instead. He was hired again at Employer on September 13, 1977, and he worked there as a welder until April 3, 1978. Claimant testified he had problems with the long commute but could not find a place near Employer to live, so he got another welder's job in Natchez. (Tr. 26-27). He was rehired as a painter-helper at Employer on August 9, 1979, which is currently his seniority date. Between 1979 and 1988, Claimant was laid off and subsequently reinstated by Employer on three different occasions. In the interim he collected unemployment and was able to find jobs as a general laborer and a welder. On January 18, 1988, Claimant was reinstated as a cable puller; he transferred into welding on September 30, 1988. (Tr. 27-30).

On March 7, 2002, Claimant was a first-class structural welder. His job involved climbing, crawling, and heavy lifting of 40-50 pounds. He described his job as very physical. Specifically, Claimant was required to carry his welding box while climbing ladders and crawling through small spaces; he also had to roll up and carry the welding lines. Approximately 75% of his work was performed overhead. (Tr. 30-32). Claimant testified he had no prior injuries to his arm or shoulder and did not have any problems performing his job prior to March 7, 2002. (Tr. 32-33).

On March 7, 2002, Claimant suffered an accident while working. He was re-routing his welding line when the covering on the uptake collapsed, knocking him unconscious. Claimant woke up the next morning with a cast on his right arm extending from his hand to his shoulder. In all, Claimant injured his right forearm, elbow, shoulder and neck, cracked his sternum and busted his lip. (Tr. 33-36). Claimant displayed a nine-inch scar on his right arm, and was wearing his arm in a brace at the hearing, which brace was prescribed to him by Dr. Barnes. Claimant testified he can use his arm some, but it gets tired easily. Claimant also stated that wearing the brace on his arm and shoulder helps with his pain. (Tr. 36-38).

When Claimant's cast came off he started physical therapy. Due to his difficulties with bending his right arm, Claimant was

hospitalized twice in 2002 and his doctors "bent his arm while he was sleeping." Claimant testified when he first started physical therapy he could not touch his face with his right hand, but now he can raise his right arm above his head if he concentrates. In therapy, he can raise his right hand with up to four pounds in it, with which he continues to work. (Tr. 38-39). Claimant continues to attend two hours of physical therapy three days per week. (Tr. 40, 46).

In October 2002, Dr. Barnes released Claimant to light duty work with minimal use of the right arm. Based on these restrictions, Employer placed Claimant in their bicycle shop where he fixed flat tires and washed coveralls. Claimant was able to do this work and was paid his regular wages, but it only lasted about 56 days, or until January 23, 2003. Claimant has been off of work since that time. Each time he visits his doctor he gets a work slip, but Employer has not been able to place him since January 2003. (Tr. 40-42, 44). On cross-examination, Claimant testified he has not applied for any transfers to another department within Employer. (Tr. 58).

In the interim, Claimant had right shoulder rotator-cuff surgery on March 4, 2003. Claimant followed-up with Dr. Barnes and returned to physical therapy three days per week after recovering from this surgery. In July 2003, he had another surgery to remove the hardware placed in his arm. After two months of recovery he resumed physical therapy. (Tr. 42-43). In September 2003, Dr. Barnes released Claimant to perform sedentary work with maximum lifting of 10 pounds; in October 2003 his release was modified to light work, lifting up to 5 pounds with his right arm. (Tr. 64). On cross-examination, Claimant testified he took this restriction to Employer on numerous occasions, but was turned away. He was fully aware he was released to work as of September 2003. (Tr. 64).

Claimant testified that Employer ceased authorization of his physical therapy as of March 10, 2004; however, the parties reached an agreement as to this issue prior to the hearing and Employer agreed to continue providing physical therapy as recommended by his doctor. (Tr. 44). Claimant testified on cross-examination that he has attended more than 100 sessions of physical therapy, after which his arm hurts a great deal. Claimant also does exercises at home to increase his arm strength. (Tr. 62, 69).

Claimant testified both Dr. Barnes and his physical therapist are aware he wears the arm and shoulder brace. No one

has told him not to use the brace, although he clarified he does not wear it all the time. He tries not to wear it unless his arm is in pain. (Tr. 45, 68). Claimant stated his shoulder hurts the most when his arm is hanging loose; if he does not wear his sling he often hooks his fingers into his belt loop to prevent his arm from hanging and creating pain in his shoulder. He further testified he has gone a whole day without wearing his brace, but the following morning he could not move his arm. (Tr. 69-70). On cross-examination, Claimant testified he wore out his first brace and Dr. Barnes prescribed his current brace about one month before the hearing. Claimant is also prescribed Lortab, although it does not completely relieve his pain. Claimant testified his last prescription was for 100 tablets, which lasts him about three weeks. (Tr. 60-62).

Claimant further testified his employment status at Employer is currently "industrial leave of absence" since January 23, 2003. He is a member of the Metal Trades Department, AFL-CIO, Pascagoula Metal Trades Council, which entered into an agreement with Employer from March 3, 2003 through March 4, 2007. (Tr. 47-48; CX-6, p. 86). Claimant testified he intends to return to work at Employer within the temporary restrictions assigned to him by Dr. Barnes. He has not yet received permanent restrictions. (Tr. 49-50).

Claimant testified the collective bargaining agreement reached between Employer and his union prohibits him from accepting an outside job while on industrial leave of absence. Specifically, Claimant testified Section 1(e) of Article 14 states Employer's services will be cancelled should he accept a job at an outside employer. Claimant stated he cannot afford to lose his 25 years of seniority, therefore he did not seek outside employment. (Tr. 51-53). On cross-examination, Claimant stated he understood the union controlled everything, and that the union and Employer were one in the same. He did not contact anyone in Employer's industrial relations division about his ability to accept outside work. However, a man at the union told him he cannot accept outside work as per the CBA. (Tr. 59, 66). Claimant did not know the details of Employer's retirement plan, but it is not his intention to retire. (Tr. 53).

Claimant received a list of jobs identified by Employer, and applied to the security and carwash positions on August 3, 2004. Claimant has not heard back from any prospective employers yet. He later testified the employers did not actually have any openings available, but he submitted his

written application anyway. (Tr. 54-56, 67). On cross-examination, he testified he waited from his return to work in September 2003 until August 3, 2004, before applying for any jobs because he did not think he was supposed to apply under the union's agreement on industrial leave at Employer. He further stated someone at the union informed him of this policy. (Tr. 59).

Barbara Melinda Wiley

Ms. Wiley is an Employee Relations Representative and the return-to-work coordinator at Employer. She places people with temporary restrictions who are on non-industrial leave, as well as individuals with permanent restrictions who are either on non-industrial or industrial leave. She testified Employer's standard procedure is to place an employee back to work on temporary restrictions for a maximum of 56 days per injury.[3] (Tr. 73-74). After an employee's temporary work expires, they are either placed to work at their permanent restrictions or placed back on industrial leave of absence or medical leave of absence, where Employer pays 2/3 of their health and life insurance premiums and retirement, etc. (Tr. 75, 79). The third party administrator, F.A. Richard, handles the reinstatement of workers' compensation benefits; Ms. Wiley testified Employer is generally not aware whether an employee will be eligible for these benefits. (Tr. 75). On cross-examination, Ms. Wiley stated Claimant had not yet reached maximum medical improvement, and was being paid compensation based on temporary total disability. (Tr. 89).

Ms. Wiley testified Employer could not honor Mrs. Washington's request to place a lien on Claimant's workers' compensation benefits for his apparently unpaid child support payments, as they are not regular wages. Although Mrs. Washington presented a court order, she was asked to return when Claimant was placed back on pay-roll. (Tr. 94-96).

Ms. Wiley testified Claimant last worked light duty at Employer on January 22, 2003, and was placed back on industrial leave of absence as of February 24, 2003. His light duty work

[3] Ms. Wiley testified Employer had a written policy for limiting temporary work placement to 56 days, although she did not bring a copy of the policy with her and one was not requested by Claimant. Although, she conceded Claimant did request "documents regarding placement upon return-to-work"; Ms. Wiley understood this to be a request pertaining to Claimant's actual return-to-work, and not the Employer's general policy. (Tr. 102-03).

was valuable to Employer and he had the same rights as any other employee on temporary status, which is his current status. Claimant's seniority date at Employer is August 9, 1979. (Tr. 76, 93). Ms. Wiley further stated Claimant is still considered an employee, and continues to receive benefits such as health insurance, life insurance, retirement and vacation time. Additionally, Claimant is eligible for internal transfers to other positions but he has not applied for any such transfer. If he does choose to transfer within the company, he would lose his seniority date with his division, but can always reinstate in his old division at his original seniority date. (Tr. 76-77, 93, 109). However, after 56 days of working on temporary restrictions, he was denied placement within his temporary restrictions on January 23, 2003, September 4 and 29, 2003, March 18, 2004 and June 7, 2004. Ms. Wiley testified Claimant has not been rejected on the basis of any permanent restrictions, as he has not presented with permanent restrictions. (Tr. 79-80).

Ms. Wiley further explained Article 14, Section 1(e) of the bargaining agreement between Employer and the AFL-CIO Metal Trades Council, as submitted in CX-20, only pertained to non-industrial leave of absence. Ms. Wiley testified industrial leave, such as what Claimant was on, was handled entirely differently. She described Section 1(e) as very misleading, because there was nothing to qualify the definition of "absences due to illness or injury," specifically, there was no indication that such illness or injury was limited to those sustained outside work, and thus considered non-industrial. However, Ms. Wiley conceded the entire bargaining agreement was contained in this document, and she did not have any documents to support her interpretation of the section. (Tr. 81-84). Ms. Wiley then testified Employer has no written policy about industrial leave and how it is administered to the employees, and she conceded that the collective bargaining agreement does not relate only to non-industrial leave. She explained that based on her 30 years experience at Employer they have always treated industrial and non-industrial leave policies differently. (Tr. 84-85). However, Ms. Wiley further testified there have been no prior grievances filed based on the interpretation of Art. 14, Section 1(e). Ms. Wiley stated she was not part of the negotiating committee which drafted the provision, and did not know the intent of the committee. (Tr. 87-89).

On cross-examination, Ms. Wiley testified Claimant was not prohibited from finding work outside Employer's facility. She stated his workers' compensation would likely be reduced, but

that he would remain on industrial leave until the claim was closed, at which time his employment would close, too. (Tr. 90, 108). Ms. Wiley stated other employees on temporary total disability have notified her they took outside jobs, and they were not terminated. (Tr. 91). Before anyone is terminated, Ms. Wiley, or someone else, in labor relations reviews such an action; she testified she would not terminate Claimant or close out his claim if he found light-duty work outside Employer. (Tr. 108).

Ms. Wiley also stated that the prospects of permanently placing Claimant back to work when he reaches MMI are very poor, unless his condition significantly improves. She testified it would be in Claimant's best interest to look for outside work within his restrictions. (Tr. 91). On re-direct examination, Ms. Wiley testified Employer has light duty positions, including the bicycle shop job, which Claimant already performed, and a security guard position. She clarified that the security guard position was outside Claimant's present restrictions, as the guards move from post to post. One week they may be at the gate, but the next week they would be roving and would need to move gates and other materials. Ms. Wiley was not familiar with any cashier positions at Employer's shipyard. She testified Employer currently does not operate a shuttle bus, and any other driver position would require lifting materials into the trucks. (Tr. 97-99).

On cross-examination, Ms. Wiley testified Employer was a federal contract employer, and could not place a welder in another position without altering his employment contract and reducing his pay. For this reason, employees with temporary restrictions are limited to 56 days of temporary light-duty work. (Tr. 106-07).

Medical Evidence

Charlton Barnes, M.D.

Dr. Barnes testified by deposition on August 4, 2004. The parties stipulated to his qualifications as an orthopedic surgeon in the State of Mississippi. (EX-18, pp. 4-5). Dr. Barnes first treated Claimant on March 8, 2002, at Singing River Hospital when Claimant presented with a broken right arm. Dr. Barnes described Claimant's arm as comminuted, in bits and pieces. He performed surgery that day, involving an open reduction of his right elbow and forearm; Claimant's elbow was put back together with wires, screws, pins and plates. Dr.

Barnes testified Claimant's right arm was severe; additionally, Claimant was right-handed. Id. at 5-7. He testified the surgery went fine, and Claimant was discharged from the hospital three days later, on March 11, 2002. Id. at 8.

Following the surgery, Dr. Barnes continued to treat Claimant to ensure he healed properly; x-rays were performed regularly until the bone was healed enough to undergo range of motion. He also prescribed Claimant extensive physical therapy to regain use of his right arm. (EX-18, pp. 8-9, 49). Overall, Dr. Barnes testified he was amazed at how well Claimant recovered and considered the surgical procedure a success. He testified Claimant needed to have two manipulations following the surgery, one on his right shoulder on July 30, 2002, and one on his right elbow on August 16, 2002. Dr. Barnes explained these manipulations were to increase Claimant's flexion and helped him markedly. Although Claimant does not have normal flexion, it is satisfactory for an injury of this type. (EX-18, pp. 9-11). Dr. Barnes testified Claimant was later found to have a tear in his right shoulder rotator cuff; surgery was performed on March 4, 2003, from which Claimant is still recovering. On July 1, 2003, Dr. Barnes surgically removed the hardware from Claimant's elbow. He testified Claimant is still unable to work, despite his good flexion, secondary to his rotator cuff surgery. Id. at 11.

Following the second manipulation on August 16, 2002, Claimant has worked hard at his recovery, which Dr. Barnes described as better than 95% of his patients with similar problems. Dr. Barnes testified Claimant's rotator cuff tear was extreme and was not discovered until later in his treatment. Although Claimant has been recovering remarkably well from his elbow, arm and rotator cuff injuries, he still has significant weakness, which is why Dr. Barnes has restricted him to minimal use of his right arm. (EX-18, pp. 11-12). However, Dr. Barnes further testified Claimant probably could not return to work at all, because someone could pull on his right arm and further damage it. Id. at 12.

Dr. Barnes testified Claimant is still in the process of recovery two and one-half years following his injury. He stated the manipulations and therapy have helped, but Claimant will have to work on maintaining flexion in his elbow and shoulder for the rest of his life, or risk the chance of it stiffening up again. (EX-18, pp. 12-13). Dr. Barnes believed Claimant uses the arm brace to protect his shoulder; although military presses and other exercises are necessary for Claimant to regain

strength, the brace is not contradictory as it is beneficial for preventing further injury. However, being more than one year past his rotator cuff surgery, Claimant could undergo a functional capacity evaluation on his right arm and shoulder. At that point, Dr. Barnes would consider assigning maximum medical improvement, although Claimant is still recovering and improving from his rotator cuff surgery. Id. at 14-16, 29. In his office note dated June 16, 2004, and attached to the deposition as Attachment 1, Dr. Barnes opined Claimant may reach MMI in approximately 6 months, or as of December 16, 2004; he explained in his deposition that this was a "guesstimate" but that Claimant was far enough along and 18 to 24 months post-surgery is a normal healing time. (EX-18, pp. 44-45, EXH-1, p. 2).

Dr. Barnes later testified Claimant was not at MMI because he did not have sufficient strength in his right shoulder; he stated Claimant still had quite a ways to go. Specifically, Dr. Barnes testified Claimant is at 5 pounds with his right shoulder, and a normal male adult can lift about 50 pounds with one arm, so Claimant's right shoulder strength is at about 10%. However, Claimant is markedly better than most people with similar injuries. Id. at 20-22, 26-28. Dr. Barnes also testified an FCE would help move Claimant toward MMI. On cross-examination, Dr. Barnes acknowledged Claimant's physical therapists have indicated Claimant continues to demonstrate potential for improved function in his right shoulder and continues to increase weight loads during physical therapy treatments. (EX-18, pp. 38-40). He stated Claimant's range of motion in his right shoulder and elbow regressed between November 2003 and April 2004, noting that his physical therapy ceased for one month in March 2004 due to Employer's lack of authorization. Claimant's condition again improved when physical therapy resumed. Tr. (40-41)

Dr. Barnes indicated he would like to see Claimant return to work and that he thought it would be good for Claimant to do some kind of work. However, Dr. Barnes restricted Claimant to sedentary work with minimal use of his right arm to no lifting more than five pounds. Dr. Barnes noted there were no other restrictions on Claimant's ability to work; Claimant had complained of neck pain, but there was no objective evidence of any such problems. Dr. Barnes testified Claimant has been released to work within these restrictions since September 4,

2003.[4] (EX-18, pp. 16-18, 25, 30; EX-17, p. 139). Dr. Barnes did not release Claimant to light or medium duty with no use of the right arm because he was concerned Claimant would accidentally forget and use his right arm or the work would require use of both arms. (EX-18, pp. 25-26).

Dr. Barnes testified if Claimant was able to find a job which did not require the use of his right arm it would help speed his recovery. He stated he would have no problem with Claimant performing the security guard or cashier positions found by Mr. Tommy Sanders and first presented to Dr. Barnes at his deposition. Moreover, Dr. Barnes would consider the FCE results in possibly adjusting Claimant's work restrictions. (EX-18, pp. 35-36).

Dr. Barnes has prescribed Claimant pain medication, including narcotic medications, since his accident. He testified long-term prescription of narcotic pain medication is not contraindicated of Claimant's progress. However, Dr. Barnes went on to testify he is against narcotic pain medication, including Lortab, but he prescribes it when people ask for it to help their pain and sleep abilities; he stated that generally the local population is more knowledgeable on narcotic medications such as Lortab, whereas Dr. Barnes had never prescribed it before moving to Mississippi. Dr. Barnes stated Claimant asked for pain medication, which was prescribed. Dr. Barnes later clarified he treats people with what keeps them comfortable, and in light of Claimant's significant problems and credible complaints of pain, he did not see a problem in prescribing Lortab, since that is what helped. Dr. Barnes intends to wean Claimant off the medication as he nears MMI. (EX-18, pp. 19-20, 28-35).

Dr. Barnes testified none of the therapists questioned Claimant's commitment to therapy or his recovery. Considering the severity of Claimant's rotator cuff tear and the fact it was not discovered until approximately one year after his injury, Dr. Barnes testified he would expect Claimant's recovery to be about two years, although it varies from patient to patient. He explained the delay in discovering the tear was probably a result of Claimant's right arm being immobilized for so long. (EX-18, pp. 23-24). When Claimant does recover, Dr. Barnes

[4] Dr. Barnes also released Claimant to work on August 6, 2003, but there was an intervening office visit on August 13, 2003, at which Claimant was again taken off work. Dr. Barnes had no explanation for this latter report. (EX-18, pp. 45-46; CX-9, p. 170).

anticipated assigning significant impairment to his right arm and shoulder. Id. at 25, 40-41. Although Dr. Barnes initially testified he did not anticipate further surgery, he later indicated he was considering a Mumford procedure to alleviate the popping and snapping in Claimant's collarbone. (EX-18, pp. 41-43).

John C. Egbert, PT OCS

Mr. Egbert is a physical therapist at Gulf Coast Physical Therapy, who has treated Claimant since June 13, 2002. In a narrative report dated July 22, 2004, Mr. Egbert stated Claimant has received steady and regular physical therapy 2-3 times per week since 2002; the only break in his therapy was from March 10-April 22, 2004, when services were not authorized. (CX-16, p. 1). Mr. Egbert testified Claimant underwent extensive physical therapy which was complicated by multiple procedures, lenthy immobilization and the severity of his injury. While Claimant has reported improvement in his right shoulder and elbow pain, he still exhibits weakness and discomfort with passive range of motion in his right elbow and shoulder. Mr. Egbert stated Claimant wears a sling to avoid shoulder pain. He also indicated Claimant was increasing his weight loads and his shoulder muscle strength was improving. Mr. Egbert opined Claimant's condition with regard to his elbow has reached a plateau, but he continues to exhibit the potential for improvement in his right shoulder. (CX-16, p. 1).

Vocational Evidence

Tommy Sanders, CRC

Mr. Sanders was retained by Employer to perform vocational rehabilitation services for Claimant. He issued a written Preliminary Vocational Assessment and Labor Market Survey on July 19, 2004. In his assessment, Mr. Sanders stated he reviewed Claimant's medical records from Dr. Barnes, emergency room records, physical therapy notes, work restrictions and his employment application with Employer. He did not personally interview or have any contact with Claimant. (EX-20, p. 1).

Mr. Sanders indicated Claimant's prior work as a welder was a semi-skilled position. He based this current labor market survey on Dr. Barnes's lifting restrictions of 5 pounds. Mr. Sanders applied this lifting restriction to both arms, though he was not clear if the restriction was limited to only the right arm. (EX-20, p. 2). Assuming Claimant was of basic literacy

levels, Mr. Sanders found two jobs in his geographic area. The first was a security guard position at Singing River Mall which paid $5.15 per hour. Lifting was under 5 pounds, with frequent standing and walking. A valid driver's license was required. Id. The second position was that of car wash attendant as Classis Chassy which paid $5.15 per hour as well. The job entailed operating a cash register and handling change, with some stocking of light items, such as key chains. Lifting and handling was frequent, but under 5 pounds; standing and walking was occasional. Id.

When Mr. Sanders expanded his search within the restrictions of lifting up to 10 pounds with the left arm, he found two more positions in Claimant's area which have been available since March 18, 2004. The first was a security guard position which paid $7.00 per hour and the second was a fuel booth attendant which paid $6.15 per hour. Id.

Robert Walker, RC

Mr. Walker provided vocational rehabilitation services to Claimant through the Department of Labor, issuing a written report on April 23, 2004. He met with Claimant on April 13, 2004, noting Claimant was cooperative and on time to the meeting. Claimant informed Mr. Walker of his education and background, as well as the details of his March 7, 2002 accident and injury, and subsequent medical treatment. He also indicated to Mr. Walker he had more than 23 years at Employer and he exhibited a strong desire to return to work at Employer. Claimant also had a valid Mississippi driver's license, but his vehicle was unreliable. (CX-12, pp. 2-3).

Mr. Walker conducted a labor market survey on the internet as well as with the Mississippi Employment Service. He found numerous jobs as security and gate guards, hotel desk clerks, cashiers and drivers. These jobs, on the whole, paid between $6.00 and $9.25 per hour. Mr. Walker opined the feasibility of Claimant successfully finding a job is unknown depending on his physical abilities. Vocational services with Mr. Walker were terminated by Claimant, pending maximum medical improvement and a determination from Employer whether they have a position available for Claimant. (CX-12, p. 4).

IV. DISCUSSION

A. Contentions of the Parties

Claimant contends he is not yet at MMI as he continues to progress in physical therapy. Thus, he argues it is premature to conclude he will be unable to return to work at Employer at some point in the future. Claimant contends the collective bargaining agreement between his union and Employer precludes him from taking outside work as doing so would terminate his employment status with Employer, including his seniority date for benefits he still receives. Claimant asserts he does not want to give this up until he reaches MMI and it is determined he can or cannot return to work at Employer. Moreover, Claimant argues the positions identified by Employer in July 2004 do not constitute suitable alternative employment because they were not within Dr. Barnes's restrictions and were not available to Claimant when he applied in early August 2004. He asserts the labor market survey should not be given much credence as it was not based on a personal interview with Claimant and did not accurately reflect his employment history. Finally, Claimant asserts his attorney fully litigated multiple issues up until the day of trial when many issues in dispute were stipulated to; as such, Claimant's attorney should be considered to have been successful on those issues and have them reflected positively in her attorney fee award.

Employer contends Claimant was released to work by Dr. Barnes in August 2003, though Employer continued to pay Claimant temporary total disability benefits. However, Employer contends the labor market survey established suitable alternative employment for Claimant, which was approved by Dr. Barnes in his deposition. Employer asserts this labor market survey should be retroactive to March 18, 2004, at which time it contends Claimant reached temporary partial disability. Employer also contends there is conflict in Claimant's treatment evidenced by either too much physical therapy, causing him continued pain, or excessive use of the arm brace, preventing Claimant's arm from strengthening. Employer finally contends that because it voluntarily paid Claimant benefits following the accident the only issues ever in dispute were ten physical therapy sessions and one month of temporary total disability benefits, both of which Employer agreed to pay. As such, it contends Claimant had limited success which should be reflected in the attorney fee award.

B. Employer's Motion to Supplement Record

At the hearing in this matter, the record was left open to allow both parties the opportunity to submit documentary evidence in the form of a written policy statement clarifying

the ability or inability of a temporarily disabled worker on industrial leave to find work outside Employer, secondary to the vagueness of the collective bargaining agreement (CBA) between Claimant's union and Employer. Absent any other written policy the undersigned made clear the CBA would be interpreted literally. (Tr. 110-11).

On November 8, 2004, Employer motioned the undersigned to supplement the record with an affidavit of Frank Ludgood, a business agent of Claimant's union. Employer asserted this affidavit constituted legitimate rebuttal evidence to Claimant's hearing testimony that he talked to a union official who informed him the CBA prohibited acceptance of work outside Employer.

On November 16, 2004, Claimant filed an opposition to Employer's motion, contending the admission of Mr. Ludgood's affidavit would violate the Notice of Hearing and Pre-Hearing Order in this matter, and exceeded the parameters for which the record was left open. I agree. The record was only left open for the parties to submit written procedures in effect at Employer which clarified and supported Ms. Wiley's interpretation of the CBA. The affidavit proffered by Employer clearly does not meet this constraint. If Employer wanted time to investigate Claimant's testimony that he talked with a union official about the CBA, it should have made such request at the hearing on August 11, 2004. Submitting a motion almost three months later exceeds the specific reason for holding the record open, is an inappropriate method of discovery and further precludes cross-examination.

Therefore, Employer's motion is hereby **DENIED.**

C. Nature and Extent of Disability

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as the "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability

requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

(1) Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his

condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981). An employee is considered permanently disabled if he has any residual disability after reaching MMI. Lozada v. General Dynamics Corp., 903 F.2d 168 (2d Cir. 1990); Sinclair v. United Food & Commercial Workers, 13 BRBS 148 (1989); Trask v. Lockheed Shipbuilding & Construction Co., 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition. Leech v. Service Engineering Co., 15 BRBS 18 (1982). The Board has also held, in dicta, that maximum medical improvement can be established even when further improvement is likely at some unspecified point in the future. Walsh v. Vappi Constr. Co., 13 BRBS 442, 445 (1981).

In the present case, the parties stipulated Claimant is not yet at MMI. Throughout the course of the hearing as well as during Dr. Barnes' deposition, Employer questioned Claimant's temporary status, highlighting the fact Claimant has had over two years of physical therapy with little progress. However, Dr. Barnes and Mr. Egbert both indicated Claimant exhibits room for improvement with range of motion and strength in his shoulder. Additionally, Dr. Barnes testified he would not expect Claimant to heal from his March 4, 2003 rotator cuff surgery until 18-24 months post-operation. Employer submitted no medical evidence to contradict that of Dr. Barnes or Mr. Egbert. As such, I find Claimant has not yet reached MMI and continues to be temporarily disabled.

(2) Suitable Alternative Employment

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). An injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991); Director, OWCP v.

Bethlehem Steel Corporation (Dollins), 949 F.2d 185, 186 n. 1 (5th Cir. 1991).

In the present case, the parties agree Claimant is unable to return to his job as a welder at Employer. Claimant worked in a light duty position for 56 days, the maximum time temporarily disabled employees are allowed to work light duty positions. As such, Claimant has presented a **prima facie** case of total disability and the burden now shifts to Employer to establish suitable alternative employment to support a finding of partial disability.

Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Turner, 661 F.2d at 1042. Turner does not require employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997).

Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

In the present case, Dr. Barnes released Claimant to work as of September 4, 2003, in jobs which are sedentary in nature and require minimum use of the right arm with lifting under 5 pounds. Employer contends it has established suitable alternative employment as of March 18, 2004, per Mr. Sanders's July 22, 2004 labor market survey. However, I find the two jobs which were presumably available on March 18, 2004, were not within Dr. Barnes's restrictions of minimal use of the right arm and lifting no more than 5 pounds. Moreover, it is not clear from Dr. Barnes's deposition that he approved these jobs for Claimant. He was only asked about the cashier and security guard positions; there was no indication that the jobs he approved were those available on March 18, 2004. Mr. Sanders opined these jobs would be appropriate if Claimant was allowed to lift up to 10 pounds with his left hand; however, Dr. Barnes specifically testified he would not place Claimant in a light or medium duty job with the restriction he could only use his left arm as there was a strong likelihood, in his view, that Claimant would forget and use his right arm, or be forced to use his right arm in the course of his duties. The jobs identified by Mr. Sanders did not specify Claimant would only need to lift 10 pounds with his left arm; the descriptions merely gave the requirement of lifting 10 pounds. As such, I do not find that the identified employment constitutes jobs which are suitable for Claimant to perform.

The security guard position at Singing River Mall and the cashier position at Classis Chassy may constitute suitable alternative employment as they appear to conform to Claimant's physical restrictions and were approved by Dr. Barnes. According to Mr. Sanders's report, these two jobs were available as of July 22, 2004. However, when Claimant applied on August 3, 2004, he was informed there were no openings available. I find that locating two positions which are not actually available to Claimant is insufficient to establish suitable

alternative employment. See P & M Crane Co., supra. As such, Claimant continues to be temporarily totally disabled.

In the alternative, the CBA between Employer and Claimant's union prohibits Claimant from accepting outside work or his employment status would be terminated. As Claimant is temporarily disabled, arguably upon reaching permanent status he may be able to find suitable work within Employer's facility, or be transferred to a new division within Employer's facility. If he accepts outside work and is terminated from Employer, he would lose his seniority as well as his benefits. It is reasonable that Claimant would want to exhaust this possibility without risking his employment status.

Claimant and Employer contend the CBA says two different things. The undersigned indicated at the hearing on August 11, 2004, that the terms of the CBA would be interpreted literally, but that any supporting documents of written policies at Employer would also be considered in the interpretation. No such documents were proffered by either party. Based on the documents submitted into the evidence, I find the pertinent sections of the CBA read as follows:

> **Article 14 – Leave of Absence**
>
> SECTION 1. Absences due to illness or injury in excess of thirty (30) calendar days or other absences in excess of five (5) working days shall be covered by leave of absence, provided that absence due to illness or injury must be reported to the employee's Department within five (5) working days. An employee who has completed six (6) months employment with the Company shall, on request, be granted leave of absence for warranted reasons under the following circumstances:
>
> a. Extended absence from work due to personal illness or injury sustained while at work shall be reported to the employee's department . . .
>
> . . .
>
> e. Should any employee while on leave of absence engage in employment for another employer, such leave shall be considered as cancelled and the employee's services terminated.

(CX-20, pp. 4-5)(emphasis added).

Ms. Wiley testified that employees injured on the job are placed on industrial leave, while employees injured off the job are placed on non-industrial leave. At the hearing, she testified subsection (e), above, pertains only to non-industrial workers; as Claimant is on industrial leave the subsection would not apply to him. No reading of the above sections of the CBA could feasibly lead to such an interpretation. Article 14, Section (1), specifically subsection (e), does not delineate between employees who are injured at work and those who are injured outside of work. Article 14, Section(1) pertains to absences due to illness or injury; circumstances surrounding the illness and injury do not modify the applicability of subsection (e). Notably, subsection (a) is so modified and clearly only applies to injury or illness sustained while at work and thus employees who are subsequently placed on industrial leave. Subsection (e) makes no distinction therefore I find it applies to both non-industrial and industrial leave, including Claimant.

I find that any ambiguity in the language of the CBA shall be construed against the parties to the agreement, Employer and the Union, and not against Claimant. As Employer has previously agreed by CBA to terminate Claimant's services should he accept outside work while on industrial leave, no outside employment could constitute suitable alternative employment. As such, Claimant is temporarily totally disabled from March 7, 2002 to present and continuing.

D. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be recognized by the medical profession as appropriate

for the care or treatment of the claimant's injury. 20 C.F.R. §§ 702.401-402; Colburn v. General Dynamics Corp., 21 BRBS 219, 222 (1988). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. Salusky v. Army Air Force Exchange Service, 3 BRBS 22, 26 (1975)(any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ).

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for a claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187. Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

In the present case, the parties entered into written stipulations prior to the hearing agreeing that Employer has paid, or is in the process of paying, all medical bills related to Claimant's treatment, including physical therapy. I find Claimant is thus entitled to continued reasonable and necessary medical benefits for treatment arising from his physical injuries as a result of his March 7, 2002 accident/injury, pursuant to Section 7 of the Act.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered

a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant compensation for temporary total disability from March 7, 2002 through the present and continuing based on Claimant's average weekly wage of $757.25 and a corresponding compensation rate of $504.78, ($757.25 x .6666 = $504.78) in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's March 7, 2002 work injury, pursuant to the provisions of Section 7 of the Act, including continued physical therapy.

3. Employer shall receive credit for all compensation heretofore paid, as and when paid.

4. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

5. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days from date of service to file any objections thereto.

ORDERED this 2nd day of February, 2005, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge